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No. 04-368

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center. WLF devotes substantial resources to litigating cases and filing *amicus* briefs urging rules of law that promote free enterprise and limit government to make it more accountable in all contexts, including criminal law enforcement actions by the Department of Justice. WLF has participated as *amicus* in numerous cases which, like the present one, raise important issues regarding *mens rea* requirements in federal criminal statutes.[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. The potential criminalization of corporate compliance with document retention policies is an issue of concern to the Chamber and many of its members which have adopted such policies. The broad interpretation of vague, ambiguous criminal statutes does not provide the business community with the guidance it needs to comply with the law on the obstruction of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the government charged Arthur Andersen & Co. ("Andersen") with the willful obstruction of justice

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

because Andersen employees requested that other employees comply with the Company's document retention policy at a time when a formal investigation by the Securities Exchange Commission ("SEC") was possible but far from certain. That charge and ultimate conviction devastated Andersen, eliminating it from the already concentrated field of national accounting firms and resulting in the destruction of tens of thousands of jobs. While enforcement of the criminal law often has overwhelming consequences for affected persons and industries, its predicate must be a legislative judgment that specified conduct is plainly unlawful. This predicate was not satisfied in the case under review or in the legal rule adopted by the Fifth Circuit.

The witness tampering statute was amended in 1990 to add the criminal prohibition at issue here. Section 1512(b) of Title 18 criminalizes the knowing, corrupt persuasion of another person to destroy documents with an intent to impair the documents' availability for use in an official proceeding. In the brief period since the statute was amended, an acknowledged and mature conflict among the courts of appeals has developed concerning the meaning of knowing and corrupt persuasion. Some circuits, including the Fifth Circuit, say that it requires nothing more than persuasion with an improper purpose. Other circuits, such as the Third and D.C. Circuits, say that equating corrupt persuasion with persuasion for an improper purpose is not only impermissibly vague, but also makes the corruption requirement mere surplusage, because § 1512(b)(2)(B) already expressly requires that the persuasion be intended for the improper purpose of impairing an official proceeding. All courts appear uncomfortable with loosely defining "corrupt persuasion" as persuasion with an "improper purpose"; even the Fifth Circuit recognized that it casts only a "dim light . . . upon its meaning, its circularity aside." App. 19a.

The described conflict alone warrants this Court's intervention, but the particular problems generated by an

ongoing conflict in this legal setting make the argument for certiorari compelling. Continuing percolation of the conflicting legal rules adopted by the circuit courts is wholly inappropriate here. Initially, section 1512(b) is a criminal statute which, under our Constitution, must provide persons with reasonably clear guidance and notice about what conduct is subject to criminal sanction. See *United States* v. *Kozminski*, 487 U.S. 931 (1988). Moreover, here, the generic problem arising when there are conflicting interpretations of a vague criminal law is exacerbated by the fact that § 1512(b) has been interpreted to criminalize a non-coercive request to an employee to comply with a company's lawful document retention policy. Thus, the federal government purports to criminalize conduct that is part of numerous businesses' everyday routine and that was undertaken without any consciousness of wrongdoing. The price of allowing case-by-case evolution of the interpretation of § 1512(b) is painfully high for the individuals and businesses affected. This point is underlined by the high profile of this case and the destructive consequences of the conviction, which together have cast a pall over the administration of routine document retention policies. As we show *infra*, all of this could and should have been prevented by the appropriate use of the rule of lenity.

The petition for certiorari clearly lays out the conflicting interpretations of the statute and the importance of this Court's intervention. In this brief, accordingly, *Amici* focus on the role that the rule of lenity should have played in interpreting § 1512(b). *Amici* will show that this case provides an excellent vehicle for the Court to provide instruction about the rule of lenity, while resolving an inter-circuit conflict over the meaning of an important criminal statute whose application to the administration of document retention policies is now entirely unclear.

ARGUMENT

I. THE DECISION BELOW SUBVERTS THE RULE OF LENITY AND, IN DOING SO, EXACERBATES A CIRCUIT SPLIT.

As the petition demonstrates, the Fifth Circuit's interpretation of § 1512(b)'s *mens rea* requirement broadens an existing conflict between the Third and D.C. Circuits on the one hand, and the Second and Eleventh Circuits on the other. Pet. 18-26.[2] On both sides of the split, the cases make evident that § 1512(b) is ambiguous. The circuits' diverging views can only be resolved by this Court. See generally Gary G. Grindler & Jason A. Jones, *Please Step Away From the Shredder and the "Delete" Key: §§ 802 and 1002 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67, 74 (2004) ("The meaning of 'corruptly persuades' under § 1512(b) is, unfortunately, perhaps even less certain than the interpretation of the similar language in §§ 1503 and 1505; there is much disagreement between the circuits").

In addition to deepening a pre-existing circuit split, the Fifth Circuit's determination that the ambiguous "corruptly persuades" language criminalizes the conduct of a defendant who acts with an "improper purpose" reflects a fundamental misunderstanding of the rule of lenity. Correctly applied, this rule resolves the interpretation of ambiguous criminal law statutes in favor of their strict construction and has the potential to prevent the troubling development of inter-circuit conflicts about the interpretation of such statutes. The failure to use the rule of lenity to resolve ambiguity concerning a criminal law leads to (a) the misinterpretation of criminal

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[2] Without expressly resolving the proper interpretation of § 1512(b), the Eighth Circuit has recognized the statute's ambiguity, *United States* v. *Pennington*, 168 F.3d 1060, 1066 (8th Cir. 1999), and the Ninth Circuit has acknowledged the statute's competing interpretations, *United States* v. *Khatami*, 280 F.3d 907, 912-13 (9th Cir.), *cert. denied*, 535 U.S. 1068 (2002).

statutes, (b) confusion and conflict and thus inadequate notice about the rules governing conduct that can lead to moral condemnation and punishment, and (c) chaos and disruption when this Court eventually resolves the conflict because there are always issues of retroactivity and of the applicability of the new rules in habeas proceedings. Accordingly, the Court should use this case as a vehicle to resolve the conflict concerning § 1512(b), and to instruct the lower courts in the proper application of the rule of lenity.

A. The Rule Of Lenity Is A Vital Tool Of Statutory Construction For Ambiguous Statutes.

Originating in England during the late seventeenth and early eighteenth centuries to protect individuals from the expansive imposition of the death penalty, see Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 199-200 (1994), the rule of lenity remains a substantive canon of statutory interpretation essential to guarding individual rights. The rule mandates that courts faced with statutory ambiguity or more than one plausible reading of a criminal statute take the narrowest view. See *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) ("when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language") (citing cases); cf. 1 William Blackstone, *Commentaries* *92 ("[a] man cannot suffer *more* punishment than the law assigns, but he may suffer *less*"). As explained below, the Fifth Circuit's interpretation of the ambiguous "corruptly persuades" element of § 1512(b) ignored the rule of lenity and interpreted the provision expansively rather than narrowly.

The foundations of the American rule of lenity were laid in *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Chief Justice Marshall, interpreting the Crimes Act of 1790, held that this statute, which granted federal jurisdiction over cases involving manslaughter committed on an American

vessel on the "high seas," did not apply to cases involving manslaughter committed on a vessel docked on a river in China. The Court strictly construed the statute, stating:

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. [*Id.* at 95.]

See *id.* at 105 (in the absence of Congressional action "this Court cannot enlarge the statute").

Following *Wiltberger*'s teaching, strict construction of criminal statutes became the governing canon within United States courts. For example, in *United States* v. *Lacher*, 134 U.S. 624, 628 (1890), the court held that "before a man can be punished, his case must be plainly and unmistakably within the statute." See also *Ladner* v. *United States*, 358 U.S. 169, 178 (1958) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"); *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.) (it is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a higher punishment").

This Court has set forth two primary reasons for the rule of lenity: ensuring legislative supremacy and providing proper notice to the public of what conduct is criminal. In *Wiltberger*, Chief Justice Marshall emphasized that the rule was intended to guarantee legislative supremacy in the establishment of criminal law. See 18 U.S. at 95-97, 105-06. This Court later explained that "'because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.'"

United States v. *Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in Benchmarks* 196, 209 (1967)). Cf. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (the most important aspect of the prohibition of vague criminal statutes is "the requirement that a legislature establish minimal guidelines to govern law enforcement") (internal quotation marks and citation omitted).[3]

This Court has also elaborated on the rule's role in ensuring that the public is provided with adequate notice of the standards governing conduct and imposing criminal punishments. Justice Holmes, writing for the Court in *McBoyle* v. *United States*, 283 U.S. 25 (1931), stated:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that fair warning should be given to the world in language that the common world will understand . . . . To make the warning fair, so far as possible the line should be clear. [*Id.* at 27.]

Accord *Bass*, 404 U.S. at 347-49. Thus, the rule of lenity is among the "[s]ound principles of statutory construction [which] lead [the Court] to reject the amorphous definitions" that create room for arbitrary and unfair decisions by allowing judges to develop standards of criminal punishment on a case-by-case basis. *Kozminski*, 487 U.S. at 951.

Application of the rule of lenity is particularly important in cases, such as this one, involving ambiguous *mens rea* requirements. *Mens rea* requirements offer statutory protection for inadvertent violations of criminal law requirements that are not *malum in se*. For example, in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1977)

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[3] In this manner, the rule of lenity serves as a companion to the doctrine of constitutional doubt in effectuating the intent of the legislature and avoiding the creation of constitutional peril through broad interpretation of ambiguity. *Cf. Almendarez-Torres* v. *United States*, 523 U.S. 224, 270-71 (1998) (Scalia, J., dissenting).

(plurality opinion), this Court observed that the line between routine, acceptable business conduct and criminal conduct is difficult to discern, and further that the Sherman Act, "unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." As a result, it was critically important to apply the rule of lenity and interpret the Act to impose the traditional criminal *mens rea* requirement of a knowing violation of the law. See also *Liporata* v. *United States*, 471 U.S. 419, 427-29 (1985) (finding a statutory provision forbidding the knowing transfer of food stamps to be ambiguous concerning whether the seller had to know the sale was illegal and applying the rule of lenity); *Ratzlaf* v. *United States*, 510 U.S. 135, 141-49 (1994) (same, regarding the "willful" evasion of currency structuring laws).

This Court's jurisprudence continues to make the rule of lenity the determining principle of construction when the text, structure and legislative history of a criminal statute are ambiguous about its meaning and application. Most recently in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court again stated that "'when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" *Id.* at 409 (alteration omitted) (quoting *McNally*, 483 U.S. at 359-60). See also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor") (citing *Bass*, 404 U.S. at 347-49); *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (when "ambiguity survives," the court "choose[s] the construction yielding the shorter sentence by resting on the venerable theory of lenity"); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (the rule of lenity applies where the text, structure and history of the statute leave reasonable doubt about the statute's intended scope).[4]

As we show *infra*, the rule of lenity applies in this case and should have guided all courts of appeals to a strict construction of § 1512(b). Indeed, once the Fifth Circuit acknowledged that defining "'corruptly' in terms of improper purpose" is "circular[]" and casts only "dim light" upon its meaning and that other tools of statutory guidance did not resolve § 1512(b)'s ambiguity, App. 19a, that court should have applied the rule of lenity and concluded that the statute did not criminalize Andersen's actions in this case.

B. Courts On Both Sides Of The Split Agree That § 1512(b) Is Ambiguous.

While the circuits' approach to the "corruptly persuades" cases is anything but consistent, one coherent theme emerges: § 1512's text is ambiguous, and even the circuits that do not find it void for vagueness have resorted to subsidiary aids to statutory construction in order to provide meaning. The legislative history and other aids to construction, however, are as vague as the text. This is precisely the situation in which a court should apply the rule of lenity, but the Fifth, Second and Eleventh Circuits have failed to do so.

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[4] There is a debate among justices of this Court concerning whether the rule of lenity applies whenever statutory text is ambiguous or only in "situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal*, 498 U.S. at 108 (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)). *See id.* at 131-32 (Scalia, J., dissenting) (debating the majority's characterization of the rule); *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring in part and in the judgment) (the Court's "treatment of 'the venerable rule of lenity,' does not venerate the important values the old rule serves") (internal citation omitted). This debate is irrelevant here. The statute is ambiguous before and after application of all traditional tools of statutory construction so the rule of lenity should have been applied under all justices' views.

1. In *United States* v. *Farrell*, 126 F.3d 484 (3d Cir. 1997), the Third Circuit reversed a defendant's conviction under § 1512(b) for "corruptly persuading" a witness to withhold information from the Department of Agriculture. The court found "the phrase 'corruptly persuades' to be ambiguous," *id.* at 487, concluding that the meaning of "corruptly" was not discernible "from the face of the statute," the legislative history, or other statutes prohibiting obstruction of justice generally, *id.* at 487-90.

The government proposed that § 1512's "corruptly" element should be read to require only an "improper purpose," a definition used in some of cases interpreting the *mens rea* element of § 1503. The court, however, flatly rejected the argument that "corruptly" means "'motivated by an improper purpose'" for the purposes of § 1512(b). *Id.* at 489-90. The Third Circuit reasoned that § 1512(b)'s "knowing" element and specific intent requirement rendered the government's proposed construction of "corruptly" superfluous. *Id.* at 490 ("because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' . . . renders the term surplusage, a result that we have been admonished to avoid"). Finally, the court explained that even if other more expansive readings of § 1512 were reasonable, the rule of lenity demanded a strict construction of the statute. *Id.* at 489 (citing cases).

In *United States* v. *Poindexter*, 951 F.2d 369 (1991), the D.C. Circuit held that the word "corruptly," as used in the former § 1505, "on its face . . . is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" *Id.* at 378 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The court explained that "corruptly" has both a transitive and intransitive meaning, the former involving the persuasion of another by means of corruption or bribery while the latter

involves persuading wickedly or immorally, that is, with a bad motive. *Id.* The court adopted the transitive meaning to avoid unconstitutional vagueness and concluded that even that reading "would still be unconstitutionally vague" without the additional requirement that the defendant "violate [a] legal duty." *Id.* at 379 (emphasis omitted). Further, the court found that the text failed to satisfy the notice rationale for the rule of lenity set forth in *Bass*, 404 U.S. at 348. See 951 F.2d at 386 ("neither the legislative history nor the prior judicial interpretation of § 1505 supplies the constitutionally required notice that the statute on its face lacks").[5]

In *United States* v. *Davis*, 183 F.3d 231 (3d Cir.), *amended by* 197 F.3d 662 (3d Cir. 1999), the Third Circuit revisited the meaning of "'corrupt persuasion'" in § 1512, and again expressly recognized that a jury instruction defining "corruptly" as "'having improper motive or purpose'" was erroneous. 183 F.3d at 250 & n.6. Relying on *Farrell* and *Poindexter*, the court reiterated that the government's "improper purpose" interpretation of "corruptly" renders the term unlawfully vague. *Id.* at 249-50. Specifically, the *Davis* court adopted, in the § 1512(b) context, *Poindexter*'s conclusion that "corruptly" needed to be accorded a transitive meaning to avoid unconstitutional vagueness. See *id.* at 249.

By adopting a transitive meaning of "corruptly" including a heightened *mens rea* requirement to avoid vagueness, *Davis* and *Poindexter* embrace the lenity principle.

2. The Second, Fifth and Eleventh Circuits have acknowledged that § 1512's "corruptly" language is not clear-cut, but they have nonetheless elected to interpret the statute expansively. In *United States* v. *Thompson*, 76 F.3d 442, 452

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[5] After *Poindexter*, Congress amended § 1515 to redefine "corruptly" as used in § 1505. *See* Pet. 18 n.19. The amendment provided "the term 'corruptly' means acting with an improper purpose." 18 U.S.C. § 1515(b). Congress conspicuously applied that new definition *only* to § 1505, notwithstanding that §§ 1503 and 1512 also use "corruptly."

(2d Cir. 1996), the Second Circuit held that § 1512(b) was not "unduly vague," assuming without significant discussion that § 1512(b) uses "corruptly" to mean that the government must prove defendant's attempts to persuade were motivated by an "improper purpose."[6] Similarly, in *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), the Eleventh Circuit rejected a vagueness challenge to § 1512(b) and endorsed both *Thompson*'s discussion, *id.* at 1300, and the *Farrell* dissent as its rationale. See *id.* at 1300-01. The court below thus joined the Second and Eleventh Circuits in "defining 'corruptly' in terms of improper purpose *despite the dim light it casts upon its meaning, its circularity aside*." App. 19a (emphasis supplied).

The courts that broadly interpret "corruptly persuades" rely on § 1512's legislative history and selected § 1503 case law to support the "improper purpose" interpretation. See *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting); accord *Shotts*, 145 F.3d at 1300. The legislative history, however, is wholly indeterminate. Senator Biden's remarks relating to "corrupt persuasion" account for a few paragraphs in a lengthy section-by-section analysis of the Anti-Drug Abuse Act of 1988, and reveal only that the "corruptly persuades" language was intended to overrule a Second Circuit case and assure that non-coercive witness tampering could be prosecuted under federal law. See 134 Cong. Rec. 32701 (1988). Indeed, the definitional language introduced by the House Report, and

[6] In doing so, the Second Circuit applied its prior interpretation of § 1503 where it had approved of an "improper purpose" instruction, despite the different *mens rea* elements of that statute. *See Thompson*, 76 F.3d at 452 (citing *United States* v. *Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978) (per curiam)). However, as purported further support for its application of the "improper purpose" standard, the Second Circuit also cited *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), *see Thompson*, 76 F.3d at 452, despite the fact that in interpreting § 1503's "corruptly" element, the Ninth Circuit held that the act had to "be done with *the purpose of obstructing justice*." *Rasheed*, 663 F.2d at 852 (emphasis supplied).

enacted as § 1515(a)(6), merely states the "term 'corruptly persuades' does not include conduct that is not 'misleading conduct' because a state of mind required for 'misleading conduct' is lacking." H.R. Rep. No. 100-169, at 12-13 (1987); *id.* at 13 n.27; see also 18 U.S.C. § 1515(a)(6) (implementing House language and defining "corruptly persuades" as used in §§ 1512 and 1513). Nowhere does the legislative history of § 1512 equate "corruptly" with an "improper purpose," or cite any § 1503 cases applying the *mens rea* element in those terms.[7]

In fact, even the Fifth Circuit ultimately did not find that the legislative history dictated its interpretation of "corruptly persuades," but instead opined that "defining 'corruptly' as 'motivated by an improper purpose' *comports easily* with the legislative history." App. 23a (emphasis supplied). In so holding, the court revealed its erroneous understanding of the rule of lenity. The rule of lenity requires a *restrictive interpretation* of a statute whose text and legislative history leave its meaning unclear. The fact that the legislative history is also consistent with a broader interpretation cannot justify the court's failure to apply the rule of lenity.

Like the other circuits adopting the "improper purpose" interpretation of § 1512(b), the Fifth Circuit broadly interpreted an ambiguous text and legislative history, embracing the harsher of two readings of a criminal statute although neither Congress's language nor its legislative history were "clear" or "definite." *McNally*, 483 U.S. at 359-60. The Fifth Circuit's failure to apply the rule of lenity here

[7] Not a single case cited in Senator Biden's discussion of "corrupt persuasion" mentions the phrase "improper purpose." *See* 134 Cong. Rec. at 32701 (citing cases); *cf.* Pet. 23 n.23 (discussing the cases' nexus to independently wrongful acts). To the contrary, *United States* v. *Lester*, 749 F.2d 1288, 1294 n.4 (9th Cir. 1984), stated "'the word "corruptly" as used in § 1503 means that the act must be done with the purpose of obstructing justice'" (alterations omitted) (quoting *Rasheed*, 663 F.2d at 852).

meant that the *mens rea* requirement in § 1512(b) could not fulfill its constitutionally-important functions in a setting where the conduct at issue was undertaken without consciousness of wrongdoing.

Indeed, the Fifth Circuit's "statutory inflation" of § 1512(b) "raise[s] concerns about both legislative primacy and due process." Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 Wm. & Mary L. Rev. 2209, 2262 (2003). Congress stated a *mens rea* requirement of "knowing" and "corrupt" persuasion, as well as the improper purpose of interfering with a proceeding. By failing to give the requirement of "corrupt" persuasion any content – let alone content more demanding than knowing persuasion – the Fifth Circuit authorized a prosecution not contemplated by the legislature. This approach contravenes the rule of lenity.

C. Further Percolation Is Both Inappropriate And Counter Productive Here.

There are three important reasons that further percolation of this issue in the lower courts is inappropriate.

First, the law must give notice of what conduct may be punished by criminal sanction. As this Court has explained, "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27). It is difficult to reconcile the continuing tolerance of uncertainty about the meaning and implications of a vague statute and the due process imperative of clear and fair notice.

In addition, a continuing conflict in the scope of a criminal law simply stores up unfairness, trouble and confusion for courts in the future. As Justice Scalia has observed:

> In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction [the rule of lenity] consistent application: by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime. [*Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) (citing *Bousley* v. *United States*, 523 U.S. 614 (1998))].

Bousley was a case that the Court heard in order to sort out the consequences of *Bailey* v. *United States*, 516 U.S. 137 (1995), which resolved a circuit split about the meaning of the prohibition on the "use or carry[ing]" of a firearm in the commission of a crime. Once the Court resolved the split, substantial additional litigation ensued concerning retroactivity. This Court ultimately heard *Bousley* to resolve a circuit split over whether defendants who pled guilty could raise *Bailey* challenges on habeas corpus review. It held such challenges were available on habeas if defendants could show "'actual innocence.'" 523 U.S. at 623-24. *Bousley* illustrates the widening ripples of inter-circuit conflicts that percolate for any significant period and are resolved in defendants' favor. Because a defendant convicted by a jury that has been erroneously instructed on an element of a criminal offense can often plausibly plead actual innocence, the resolution of a circuit split can give rise to substantial issues related to the issuance of a writ of habeas corpus. In sum, the price for sustained inter-circuit conflicts about the meaning of criminal statutes is high, both for defendants swept in by overbroad interpretation and for the judiciary whose caseload is multiplied.

Finally, in a related point, as Justice Scalia noted in *Bryan*, the rule of lenity, properly understood and applied, should prevent circuit splits. If the courts of appeals faithfully applied the rule when ordinary tools of statutory construction resulted in ambiguity, there would be fewer differing

interpretations of criminal statutes. This case provides the Court with an opportunity to give needed instruction on this point.

For all of these reasons, the Court should decide this issue now, end the conflict, and clarify the important role played by the rule of lenity.

II. THE DECISION BELOW HAS SUBSTANTIAL DAMAGING IMPLICATIONS FOR THE ECONOMY AND INDIVIDUALS.

A. The Decision Below Criminalizes Supervision Of Legal Conduct And Creates Uncertainty And Inefficiency.

This was a high profile prosecution that destroyed a business and many professional careers. The legal message that this prosecution sent has not been lost on businesses and individuals. If a company or executive has any basis to believe that a formal government investigation may be commenced at some point in the future, continued compliance with a lawful document retention policy may result in criminal prosecution. Indeed, the uncertainty that has resulted from the prosecution and conviction of Andersen and the conflicting legal standards applied in the courts of appeals amplifies the uncertainty of businesses and individuals and results in unfairness to those prosecuted in different regions.

Criminal penalties are reserved for the most egregious conduct; moreover, unlike civil law penalties, criminal sanctions typically apply only to that conduct which society views as unambiguously wrongful. The Fifth Circuit's reading of § 1512(b) in this case, however, enters new territory, criminalizing conduct that was believed to be lawful and that consisted of reminding a subordinate to engage in wholly lawful conduct. See Pet. at 17-18. This point is illustrated by the following article's title: Steven Lubet, *Document Destruction After Arthur Andersen: Is It Still Housekeeping or Is It A Crime?* 4 J. App. Prac. & Process 323 (2002).

At the time of Andersen's alleged obstruction of justice, it was lawful and economically beneficial for Andersen to maintain a document retention policy and for Andersen employees to destroy documents in compliance with that policy. See Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 721, 724-25 (2003) (discussing economic benefits of document retention policies). It was also lawful for a supervisor who discovered that employees were not complying with the document retention policy to destroy the documents him or herself. Under the Fifth Circuit's rule, however, it was illegal for that supervisor to suggest that employees observe the document retention policy if one object of the suggestion was to impede some future fact-finding by the government. This pushes an already severe form of vicarious corporate liability to an extreme. It is difficult to conceive of another area of the criminal law in which two individuals have precisely the same *mens rea*, and the one who acts is guilty of no crime, but the second who suggests that the first act *legally* is deemed to have engaged in illegal conduct.

The effects of this anomalous situation are severe for businesses and individuals. Companies and employees will be consumed by inefficient caution. If an official investigation even approaches the horizon, it will become impossible as a practical matter for a company to advise its employees to comply with its efficient and legal document retention policy for fear of running afoul of the law. In a company with thousands of employees which generates reams of paper, such an approach is onerous. For a small business, where space limitations, storage costs, and legal advice are relatively more burdensome, such a rule is even more oppressive. If Congress wants to impose those burdens and to criminalize failure to act in accordance with a federal rule of

document retention, then it should do so expressly and unambiguously. Absent that, prosecutors should not be invested with a roving commission to stretch criminal law to fit conduct not clearly prohibited. Only a faithful and consistent use of the rule of lenity can prevent the kind of needless harm that prosecution in this case created, and only this Court can restore the rule to its rightful place as a bulwark against oppressive government action.

B. The Conviction Of Andersen And Others Under Amorphous Standards Inflicts Significant Damage On The Economy.

Instead of prosecuting individual actors, the United States chose to prosecute Andersen, allowing the jury to spread blame for the ambiguous actions of a few across a corporate structure. By holding that Andersen violated § 1512(b) even though its document retention policy did not violate any independent legal duty, the prosecution was able to conflate legal and illegal acts, ultimately allowing the jury to punish a faceless corporation.

Multiple commentators opined that in the aftermath of Enron's collapse, government prosecutors were under intense pressure to obtain a symbolic conviction or find a scapegoat, and thus turned to Andersen because of the perceived ease in prosecuting obstruction of justice. See, *e.g.*, Jeffrey Toobin, *End Run at Enron: Why the Country's Most Notorious Executives May Never Face Criminal Charges,* New Yorker, Oct. 27, 2003, at 48 (a federal investigator stated that in Enron's aftermath, "'[w]e made Andersen our first case because it was easy and it was obvious'"). There is every indication that the government will continue to pursue corporate actors through quasi-vicarious liability in addition to, or in lieu of, individual prosecutions. See generally U.S. Dep't of Justice, Memorandum from Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm

(outlining the government's focus on federal prosecution of business organizations).

With a single stroke, and absent any showing of conduct that a reasonable person would know to be criminal, the government destroyed an important actor in a vital sector of the United States economy. As one commentator observed:

> [T]he attitude was Arthur Andersen got what it deserved.
>
> The question is: What is Arthur Andersen and *who* got what they deserved? You know, some secretary in Des Moines that doesn't have a job now or some junior auditor in Atlanta? I mean, that's who got punished. There is no such thing as Arthur Andersen and there is no such thing as Enron. You can't punish a legal entity.[8]

To be sure, enforcement of the obstruction of justice laws against corporations may serve the overall social good and benefit the economy by ensuring that shareholders are protected and markets remain competitive. In this case, however, an extravagant legal theory, tried and imposed without sufficient *mens rea* protections, irreparably damaged individual lives and American business. Andersen was eviscerated, because an incorrect and overbroad legal standard was applied. It may be too late to undo the damage to Andersen and its employees, but it is clearly not too late to prevent this mistake from being repeated.

This Court should clarify the reach of § 1512(b), so that individuals and businesses know what they must do to comply with the law on the obstruction of justice, and so that the courts of appeals generally understand the role of the rule of lenity in the interpretation of ambiguous criminal laws.

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[8] ABI Roundtable Discussion, *Remember When – Recollections of a Time When Aggressive Accounting, Special Purpose Vehicles, Asset Light Companies and Executive Stock Options Were Positive Attributes*, 11 Am. Bankr. Inst. L. Rev. 1, 10-11 (2003) (footnotes omitted) (emphasis supplied).

Without clarification of these rules, increasingly aggressive prosecutions of white-collar crime may inflict incalculable economic and intangible harm on businesses, their employees and their shareholders.

CONCLUSION

For all of these reasons, and those stated by petitioner, the petition should be granted.

Respectfully submitted,

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